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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Appellant, v. DOUGLAS LORTAN SMITH, Defendant and Respondent.	B213393 (Los Angeles County Super. Ct. No. NA078201)

APPEAL from an order of the Superior Court of Los Angeles County. James B. Pierce and Gary J. Ferrari, Judges. Affirmed.

Steve Cooley, District Attorney, Phyllis C. Asayama and Susan K. Dozier, Deputy District Attorneys, for Plaintiff and Appellant.

Kenneth J. Kahn and Kenneth H. Lewis for Defendant and Respondent.

The People appeal from an order denying their motion to reinstate a felony complaint dismissed at the conclusion of the preliminary hearing. The People contend the magistrate improperly excluded as multiple-level hearsay one police officer's testimony regarding a statement defendant Smith made to another police officer. We find no error and affirm.

BACKGROUND

A felony complaint filed May 5, 2008, charged Smith with battery with serious bodily injury and assault by means of force likely to produce great bodily injury upon the same victim, Ryan Rayburn. The complaint also alleged that Smith personally inflicted great bodily injury upon Rayburn.

At the preliminary hearing, Rayburn testified that something caused him to black out as he left a nightclub on February 10, 2008. When he awoke, the police were present and he was bleeding. He suffered nasal and sinus fractures and nerve damage. Rayburn did not recognize Smith.

Detective Bruce Roberson was the investigating officer on the case. He testified that he spoke several times to Officer Neal, who responded to the crime scene. (Neal did not attend the preliminary hearing.) Neal told Roberson that Smith was being detained by a security guard when Neal arrived. Neal then spoke to Smith and issued him a citation.

When the prosecutor attempted to delve into Neal's conversation with Smith, defense counsel objected that the testimony would constitute inadmissible hearsay and be subject to exclusion under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602]. The prosecutor argued that "an exception" applied to Smith's statements and the "statements of Officer Neal come under the Prop 115 exception." The court responded, "I disagree strongly. It's double hearsay. Officer Neal can testify as to what [Smith] told him. This officer can't tell what Officer Neal told him what he said. That's double hearsay. 115 wasn't for double hearsay."

The prosecutor introduced no evidence linking Smith to the charged crimes. The magistrate granted Smith's motion to dismiss the complaint for insufficient evidence.

The People moved for reinstatement of the charges pursuant to Penal Code section 871.5, arguing that the magistrate's evidentiary ruling and subsequent dismissal were legally incorrect. (All further statutory references pertain to the Penal Code unless otherwise noted.) The motion argued that Roberson would have testified that Smith told Neal that he punched Rayburn twice with his fist. The superior court denied the motion, and the People appealed.

DISCUSSION

The People argue that Roberson's proposed testimony was admissible under Evidence Code section 1201 because a hearsay exception applied to each level: Smith's statement to Neal was an admission (Evid. Code, § 1220) and Neal's statement relating that admission to Roberson was admissible under Penal Code section 872, subdivision (b).

Penal Code section 872, subdivision (b), which was added by Proposition 115, establishes a "limited exception to the general hearsay exclusionary rule of Evidence Code section 1200, by allowing a probable cause finding to be based on certain hearsay testimony by law enforcement officers having specified experience or training." (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1082 (*Whitman*).) This exception permits "a qualified investigating officer to testify concerning otherwise inadmissible hearsay statements made to him by persons he has interviewed . . . ." (*People v. Sally* (1993) 12 Cal.App.4th 1621, 1626.) But this exception does not permit the introduction of multiple-level hearsay, "even when offered by an otherwise qualified investigating officer." (*Montez v. Superior Court* (1992) 4 Cal.App.4th 577, 586.) This is because the California Supreme Court has interpreted Penal Code section 872, subdivision (b) to apply only where the testifying officer has sufficient personal knowledge of the crime or the circumstances under which the out-of-court statement or report was made, "so as to meaningfully assist the magistrate in assessing the reliability of the statement." (*Whitman, supra,* 54 Cal.3d at p. 1073; *id.* at pp. 1073–1075, 1078.) The personal knowledge requirement is also essential to provide the defendant with an opportunity for

meaningful cross-examination regarding the circumstances under which the out-of-court statement was made. (*Id.* at p. 1074.) "By requiring the testifying officer to have *personal* knowledge of either of the above two factors, the test appears to foreclose multiple hearsay testimony by its very terms." (*Shannon v. Superior Court* (1992) 5 Cal.App.4th 676, 682.) A "testifying officer, who has *not* interviewed the declarant, will inevitably be 'unable to answer potentially significant questions regarding the . . . circumstances' [citation] under which the statement was made." (*People v. Wimberly* (1992) 5 Cal.App.4th 439, 446.)

The People rely upon a footnote in *Tu v. Superior Court* (1992) 5 Cal.App.4th 1617 (*Tu*). The prosecutor in *Tu* presented numerous multiple-level hearsay statements at the preliminary hearing, including the testimony of an investigating officer named Peterson that his partner, Detective Martinez, told him that Tu's child told Martinez that Tu said he was going to kill the child's mother. (*Id.* at p. 1621.) This court found that Penal Code section 872, subdivision (b) did not apply to this triple hearsay statement or other multiple-level hearsay statements introduced at the preliminary hearing. In a footnote the opinion explained, "Although Tu's statement to his children that he was going to kill their mother is clearly an admission (Evid. Code, § 1220), that doesn't make it admissible here—because Martinez's statements to Peterson are inadmissible under *Whitman* and its progeny. The admission exception to the hearsay rule would be relevant if Martinez testified that the child told him what Tu had said; in that event, the Proposition 115 exception would cover the child's statement to Martinez and the admission exception would cover Tu's statement to his child. The missing exception in the case before us is one to cover Martinez's statements to Peterson." (*Tu*, at p. 1623, fn. 8.)

Footnote 8 in *Tu* properly explains that the hearsay exception provided by section 872, subdivision (b) applies to testimony by the investigating officer to whom the declarant made his or her out-of-court statement. To the extent the "missing exception" language in the footnote may be read to suggest that the section 872, subdivision (b)

exception may be employed as a wildcard to "cover" any otherwise inadmissible hearsay statement offered at a preliminary hearing, it is merely dictum. The officer testifying at the preliminary hearing must have sufficient personal knowledge of the crime or the circumstances under which the out-of-court statement was made to permit meaningful cross-examination regarding those circumstances and assist the magistrate in assessing the reliability of the out-of-court statement. Permitting Peterson in *Tu* or Roberson here to testify to a statement made to another officer by a third person would deprive the magistrate and the defendant of the opportunity to explore the reliability of the hearsay statement and raise due process concerns, as noted in *Whitman*, *supra*, 54 Cal.3d at pages 1074 and 1082.

We conclude the magistrate properly excluded Roberson's multiple-level hearsay testimony. Because nothing other than inadmissible hearsay evidence linked Smith to the attack on Rayburn, the magistrate's dismissal for insufficient probable cause was correct and the superior court correctly denied the People's section 871.5 motion.

We need not address the People's contention that the superior court applied the wrong standard in ruling upon the section 871.5 motion because "[i]n reviewing the court's denial of the prosecution's section 871.5 motion to reinstate the charge, we disregard the ruling on the motion and directly examine the magistrate's decision to dismiss at the preliminary hearing." (*People v. Plumlee* (2008) 166 Cal.App.4th 935, 938–939.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.